

**American Arbitration Association
CONSTRUCTION INDUSTRY ARBITRATION RULES**

HOSPITALITY BUILDERS, INC.,

Case No. 02-20-0000-1049

Claimant,

SPOKANE SOUTH MEDICAL, LLC

Respondent.

**SPOKANE SOUTH MEDICAL, LLC
ANSWERING STATEMENT AND COUNTERCLAIMS**

Spokane South Medical, LLC (“Spokane South”) submits its Answering Statement and Counterclaims.

NATURE OF DISPUTE

Claimant Hospitality Builder’s Inc., (“HBI”) failed to honor its contractual obligations to construct a hotel and parking garage in Spokane, Washington (“Hotel”) for Spokane South. HBI defaulted on its contractual obligations, which caused substantial (and ongoing) damage to Spokane South. To mitigate these damages, Spokane South terminated the Contract and proceeded to complete construction of the Hotel, including remedying HBI’s numerous errors and omissions. Prior to termination, Spokane South brought in an owner’s representative to oversee the project, assist in fixing problems, all with the goal of completing construction as soon as was reasonably possible.

EXHIBIT C

Discovery is ongoing concerning the extent of damage caused by HBI.

BACKGROUND FACTS

In 2013, HBI and Spokane South began discussions concerning constructing a hotel and parking garage in Spokane, Washington. Spokane South was advised that HBI was a long-standing, stable company with highly experienced employees, which would enable HBI to construct the hotel and parking garage faster and more efficiently than other companies. HBI also represented that its vast experience and ability to value engineer would enable it to construct the hotel and parking garage at lower costs.

In or about November 2015, HBI and Spokane South signed a modified version of the AIA Document A103-2007, incorporating General Conditions of the Contract for Construction A201 -2007 (“Contract”).

Construction on the Hotel began in February 2016, and immediately thereafter Spokane South began experiencing problems with HBI’s performance under the Contract.¹ Over an extended period, Spokane South attempted, in good faith, to work with HBI to resolve the issues, with the goal to minimize damages and get the Hotel completed and open as soon as possible.

¹ Vandals started a fire in the parking structure of the unfinished Hotel on November 16, 2018. The fire and resulting damage caused a delay in completion of the Hotel. The delay caused by the fire is not attributable to HBI’s performance. Had HBI timely performed its contractual duties, the Hotel should have been constructed and open by November 2018, and there would have been no fire.

However, because of repeated and ongoing deficiencies in HBI's performance under the Contract, its persistent failure and/or neglect to carry out work in accordance with the Contract, and its numerous material breaches of the Contract, Spokane South provided notice of termination of the Contract on November 19, 2019. As provided for in the Contract, Spokane South obtained a certification by the project architect that termination was justified: As stated by Dale Johnson (Architect) and Kol Nelson (Construction Administrator): "I hereby certify under Article 13.2 of the Contract, that sufficient cause exists to justify Spokane South to terminate the Contract." Mitigating its damages, Spokane South supervised the remaining work needed to complete the Hotel, which opened for business on December 27, 2019.

HBI negligently mismanaged construction of the Hotel, resulting in substantial cost overruns far in excess of what could be considered reasonable under the circumstances. HBI induced Spokane South to hire it to build the Hotel based on materially false and misleading representations about its expertise in building hotels and the qualifications and experience of the employees and subcontractors it anticipated using on this project. Notably, HBI employed at least 7 different individuals who acted as Project Managers and 3 site superintendents during the course of construction. The lack of continuity in project leadership, and HBI's mismanagement, was a contributing factor to Spokane South's damages.

Additionally, HBI failed to prepare and follow a construction schedule, which substantially hindered the construction process and contributed to the delays, cost overruns, and construction defects. HBI failed to reasonably and timely engage and manage its subcontractors, in violation of its contractual obligation to do so, which contributed to the construction delays, construction defects and cost overruns. Numerous subcontractors asked HBI for a construction schedule to facilitate coordinating their work and requested leadership from HBI's site supervisor, who repeatedly refused. HBI also failed to hire and supervise experienced project managers and site supervisors, and engage in reasonable efforts to ensure those it did hire performed their job duties and functions. HBI also hindered its project managers and site supervisors from properly performing their job duties.

HBI's numerous defaults caused Spokane South to incur substantial damages and make payments to HBI not required under the Contract, in an amount to be established in arbitration. The numerous and repeated defects in construction required corrective action, the cost of which was billed to and paid by Spokane South, with HBI not accepting responsibility for the defects, all in breach of the Contract and which resulted in overpayment to HBI. These billings were made in connection with false and/or misleading change orders that hid the true nature of what was actually taking place.

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ANSWER TO HBI'S CLAIM

HBI asserts 6 claims for relief, each of which is denied by Spokane South.

Claim 1: Payment of HBI's Alleged Damages.

HBI alleges its damages are approximately \$800,000. HBI materially breached the Contract and defaulted on its duty to fulfill its obligations under the Contract. It has already been paid far in excess of the reasonable value of the work it performed.

As alleged in Spokane South's Counterclaims, HBI was contractually entitled to payment and/or reimbursement for "Cost of Work," as that term is defined in the Contract. HBI has been paid and reimbursed for amounts far in excess of the Cost of Work, and thus is entitled to no additional compensation.

Claim 2: Subcontractor and Vendor Indemnification

All subcontractors and vendors who provided goods or services in connection with the construction of the Hotel as Cost of Work have been paid or will be paid when final billings are received. To the extent HBI's defaults and breaches of the Contract, or its negligent performance of its contractual obligations, have given rise to disputes with subcontractors or vendors, it is up to HBI (not Spokane South) to remedy those deficiencies and Spokane South has no duty of indemnification.

Claim 3: Declaration that HBI has No Warranty Obligations

HBI materially breached the Contract and defaulted on its duty to fulfill its obligations under the Contract. As such, any purported warranty waivers in the

Contract are invalid and unenforceable. HBI represented it had extensive expertise and experience in constructing hotels similar to the one Spokane South planned to build, and based on these representations, Spokane South hired it to construct the Hotel. HBI is obligated both under the Contract and common law to stand behind and warranty the work it was paid to complete.

Claim 4: Declaration that Spokane South is Liable for Sales Tax

Spokane South's obligation to pay applicable state sales tax is set forth in the Contract and under applicable law. Spokane South has (and will continue to) honor its legal obligations to pay sales tax where required to do so.

Claim 6: Attorney Fees and Collection Costs

Denied.

Spokane South is entitled to its attorney fees, arbitration costs and expenses in defending HBI's claims.

Claim 7: Interest

Denied.

COUNTERCLAIMS FOR RELIEF

Spokane South seeks an award from the Arbitrator as follows:

Counterclaim 1: Breach of Contract - Reimbursement for Amounts Overpaid.

The Contract entitled HBI to be paid and reimbursed for "Cost of Work." Article 8.1 of the Contract specifies that the "term Cost of Work shall not include" any of the items set forth in Article 8. Specifically, Article 8.1.6 of the Contract

states that Cost of Work shall not include “costs due solely to the negligence or failure to fulfil a specific responsibility of the Contractor.”

Spokane South was billed and paid for work under the Contract that was not Cost of Work it was obligated to pay. Further, Spokane South was billed and paid HBI a Contractor Fee of 12.5% and taxes based on alleged Cost of Work that it was not obligated to pay. Spokane South is entitled to reimbursement of the amounts it over paid, in an amount to be established at arbitration.

Counterclaim 2: Breach of Contract – Failure to Employ a Construction Schedule

It is critically important in a construction project to create, keep current and follow a current written construction schedule. Upon information and belief, HBI did not follow a current construction schedule, in violation of its contractual obligations, resulting in numerous errors, defects, and construction delays, all of which caused Spokane South to incur harm and damage, in an amount to be established at the arbitration

Counterclaim 3: Breach of Contract - Warranty for Defective Work

HBI is obligated under the Contract and common law to perform warranty work to repair defective work performed under the Contract and to reimburse Spokane South for all damages, including lost profits, resulting from the breach of its warranty obligations, in an amount to be established at arbitration.

Counterclaim 4: Breach of Implied Covenant of Good Faith and Fair Dealing

HBI had an implied covenant of good faith and fair dealing under the Contract. Its manner, method and timing of constructing the Hotel violated this covenant, causing harm to Spokane South, in an amount to be proven at arbitration.

Counterclaim 5: Negligent Supervision and Retention

HBI failed to take reasonable and adequate measures to engage and supervise the actions of its employees, agents, and subcontractors in performance of the work under the Contract, causing damage and harm to Spokane South, including lost profits, in an amount to be established at arbitration.

Counterclaim 6: Misrepresentation

HBI made materially false and misleading representations to Spokane South about the experience and qualifications of its employees and subcontractors to construct the Hotel, with the intent to induce Spokane South to enter into the Contract. Spokane South reasonably relied upon these misrepresentations, causing it damage, including lost profits, in an amount to be established at arbitration.

Counterclaim 7: Unjust Enrichment

Throughout the Contract term, HBI was unjustly enriched at the expense of Spokane South. Spokane South conferred benefits upon HBI, who accepted those benefits, and under the circumstances, it would be inequitable for HBI to retain those benefits, in an amount to be established at arbitration.

Counterclaim 8: Fraud and/or Deceit

HBI deceptively and/or fraudulently allocated costs, submitted incorrect financials, submitted incorrect or misleading change orders, and billed Spokane South for work HBI knew or should have known did not constitute Costs of Work under the Contract. Spokane South was billed and paid for work under the Contract that was not Cost of Work and was misled into believing payments were being requested in compliance with the Contract, when they were not. Further, Spokane South was billed and paid HBI a Contractor Fee and taxes based on alleged Cost of Work that it was not obligated to pay. HBI's actions violated its obligation to provide correct, complete, and accurate financial information, change orders, payment requests and accounting information. HBI's intentional and/or negligent actions suppressed facts designed to mislead Spokane South, which caused harm and damage, including lost profits, in an amount to be established at Arbitration.

Counterclaim 9: Attorney Fees, Arbitration Costs and Interest.

Spokane South is entitled to attorney fees, arbitration costs and expenses, and pre-and post-judgment interest on its counterclaims.

Applicable AAA Rules

Spokane South is still computing its damages, but believes that they are between \$5,000,000 and \$10,000,000. Thus, the AAA Procedures for Large, Complex Construction Disputes apply.

Estimated Time Required for Hearing

It is estimated that 7-10 days will be required for the hearing, but this estimate may change based on discovery.

Location of Arbitration Hearing


The Contract provides for Rapid City, South Dakota as the location for the arbitration hearing.

Mediation

HBI has requested mediation. Spokane South does not oppose mediation at the appropriate time. It would be premature now to engage in mediation, as Spokane South has not fully ascertained its damages.

DATED this 28th day of January 2020.

LEE & HAYES P.C.

By 
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